FOR ARGUMENT

IN THE

Supreme Court of the United States

October Term, 1978
No. 77-1547

DOUGLAS OIL COMPANY OF CALIFORNIA and PHILLIPS PETROLEUM COMPANY,

Petitioners,

vs.

PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA; COINOCO; UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF THE PETITIONERS

LATHAM & WATKINS,
MAX L. GILLIAM,
MORRIS A. THURSTON,
GEORGE H. WU,
555 South Flower Street,
Los Angeles, Calif. 90071,
(213) 485-1234,

RODERICK G. DORMAN,
THOMAS H. BURTON, JR.,
Post Office Box 2197,
Houston, Texas 77001,
(713) 965-2532,

Attorneys for Petitioner Douglas Oil Company of California.

EVANS, KITCHEL & JENCKES, P.C.,
HAROLD J. BLISS, JR.,
363 North First Avenue,
Phoenix, Arizona 85003,
(602) 262-8863,

Attorneys for Petitioner Phillips Petroleum Company.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

October Term, 1978
No. 77-1547

DOUGLAS OIL COMPANY OF CALIFORNIA and PHILLIPS PETROLEUM COMPANY,

Petitioners,

vs.

PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA; COINOCO; UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF THE PETITIONERS

Introductory Statement

Both Congress and this Court have addressed the question of grand jury secrecy. Rule 6(e) of the Federal Rules of Criminal Procedure ("FRCrP") and the rigid requirements of "particularized need" articulated in *Procter & Gamble* demonstrate this Court's conclusion as to the importance of grand jury secrecy. Congress, likewise, has shown the same concern. *See e.g.,* the *Jencks Act,* 18 U.S.C. § 3500, passed in 1957 and amended as late as 1970, which rigidly controls the very limited use which a defendant charged with a crime may make of the grand jury transcript of an accusatory witness.

The policy underlying grand jury secrecy is prospective in operation: it assures all future grand jury witnesses that they may testify freely without fear that their testimony will be unnecessarily disclosed. That policy has been materially eroded by some lower federal courts in their willingness to subordinate the need for secrecy to liberal civil discovery. Those courts seem to be unaware that unnecessary broad disclosure of grand jury testimony invites harm to grand jury witnesses, innocent persons and the grand jury system. The fear of harm will impede free and willing disclosure of information by grand jury witnesses. Without free disclosure of any and all information that may be pertinent to antitrust violations, antitrust grand juries cannot successfully do their job.

This Court's opinion will have a significance beyond the understanding of most. It will determine the approach of every lawyer representing a client in a "business crime" grand jury investigation. Should he counsel his client to cooperate totally with the government, to volunteer, speculate and hypothesize in a manner needed by the prosecution; or should he tell the witness to only answer on the basis of real observation and knowledge, not to speculate and not to assist the government in formulating the avenues of inquiry which it should be pursuing? This Court, in this case, will significantly affect those decisions.

We submit that a lawyer's knowledge of the probable publication of his client's testimony will act to stifle the appropriate subjects of a grand jury investigation and interfere with the government's ability to prosecute. If, on the other hand, a lawyer believes that his client's testimony will be revealed under only the most urgent

of circumstances, the client will testify freely and society's interest in the prosecution of the guilty will be furthered.

The government and Petrol Stops ignore these concerns and contend that no need for continued grand jury secrecy exists. (PSN Br. 10, 14, 15, and 32; U.S. Br. 5, 7, 14 and 16.)[1] Respondents then submit, inconsistently, that the protective order entered by the district court safeguarded whatever needs for grand jury secrecy did remain after the conclusion of the criminal proceeding. (PSN Br. 12, 15, 24-28, and 31-34; U.S. Br. 17.) Unfortunately, the protective order entered entirely failed to protect those needs. The ability of any protective order to protect adequately the need for grand jury secrecy was lost when the lower court ordered the disclosure of grand jury testimony far in excess of that for which any particularized need could ever be demonstrated.

In this case (and other antitrust cases like it) a procedure should be observed that permits the civil court to determine whether one of its litigants has a particularized need for grand jury testimony. Neither the interests of civil litigants nor the needs of the criminal justice system are served where, as here, a court wholly unfamiliar with two different complex antitrust suits determines whether disclosure of grand jury testimony for use in those proceedings is required. Douglas and Phillips invited the California court, even if it wished to retain jurisdiction, to defer the determina-

---

[1]References to the Brief of Respondents Petrol Stops Northwest, Gas-A-Tron of Arizona and Coinoco are noted as "PSN Br.". References to the Brief of Respondent United States are noted as "U.S. Br.". "A." refers to the Appendix. Petitioners Opening Brief is cited as "Pet. Op. Br.".

tion of particularized need to the trial court. The California court declined to do so.

The California court could also have prudently declined to exercise its jurisdiction over the matter entirely. Douglas and Phillips contend that Rule 6(e) of the FRCrP conferred upon both the California court and the Arizona court the power to rule on the matter and, therefore, the California court should have declined to do so, leaving the matter to the better informed tribunal. Neither the government nor Petrol Stops offers legitimate or persuasive reasons why those procedures were not eminently more desirable than the one employed by the California court.

I

Compelling Reasons for Continued Grand Jury Secrecy Survive an Antitrust Criminal Proceeding

The realities of an antitrust grand jury investigation —the community and business reputation of the individuals that are investigated or give testimony, the multitude of business practices that are normally scrutinized and the uncorroborated rumors, tips and suspicions which are the substance of much of the testimony —combine to require that grand jury testimony remain secret to the highest extent possible even after the conclusion of the criminal proceeding.

The district court below ordered disclosed to Petrol Stops the entire text of each and every grand jury transcript of Douglas and Phillips employees and ex-employees. (A. 48-49.) Douglas and Phillips never

represented, as respondents incorrectly contend, that the transcript of all the grand jury proceedings was ordered disclosed by the California court. (PSN Br. 27; U.S. Br. 14.) Rather, Douglas and Phillips have explicitly stated the extent of the disclosure sought by Petrol Stops and ordered by the California court.[2] Nevertheless, Petrol Stops seeks to have this Court believe that all the reasons which Douglas and Phillips offer as requiring continued grand jury secrecy are premised on this faulty assumption. None of the reasons for the continued need for grand jury secrecy offered by Douglas and Phillips are premised on anything more than what the California court *did* order disclosed—the entire text of every Douglas and Phillips employee and ex-employee's grand jury transcript.

The transcripts ordered produced to Petrol Stops will necessarily contain references to companies and individuals other than Douglas and Phillips and their employees. Antitrust investigations are unlike most

---

[2]In the Statement of the Case in Petitioners' Opening Brief, Douglas and Phillips state: "Petrol Stops filed and served in the Arizona actions a request for production of all of the grand jury documents and transcripts in the possession of Douglas and Phillips." (Pet. Op. Br. 5.) A footnote to that quoted sentence reads: "[8]Douglas and Phillips have in their possession all documents produced by them to the grand jury and all transcripts of testimony of their employees and former employees before the grand jury." (Pet. Op. Br. 5.) Immediately thereafter, petitioners relate that Petrol Stops filed a petition for production of grand jury material in the United States District Court, Central District of California which ". . . sought the disclosure of the same documents and transcripts which had been the subject of Petrol Stops' Rule 34 request in the Arizona actions. . . ." (Pet. Op. Br. 5.) "The district judge entered an order granting Petrol Stops' production request with certain limitations on use of the materials." (Pet. Op. Br. 7.)

others for they normally examine a multitude of firms, individuals and business transactions; and any indictment that does issue will likely embrace but a small portion of the total business activities examined by the grand jury.[3] Where, as in this case, a private civil litigant receives a copy of *everything* that was said while the witness was before the grand jury, the possibility of personal and financial harm to that witness because of others learning what he said about them is considerable. (Pet. Op. Br. 11-15.)

If the broad disclosure to Petrol Stops in this case is upheld, the flow of information to subsequent antitrust grand juries will be impaired. An affirmation of this broad disclosure will signal to all future antitrust grand jury witnesses that everything they say before the grand jury can be expected to be accessible and used by a private civil litigant. This will be true even though (as in this case[4]) the private civil litigant had no

[3]The government, in arguing that the California court released only that grand jury material responsive and relevant to Petrol Stops' purported need, makes the surprising statement: "Because of the restricted allegations of the indictment, it must be supposed that all the testimony of petitioners' employees before the grand jury was relevant to the issue now before the civil court." (U.S. Br. 14.) To assume, as the government apparently does, that the scope of a grand jury investigation is never any broader than an indictment that issues is ludicrous. By that logic one would be forced to assume that, where a grand jury investigates certain activities and no indictment issues, the grand jury investigation never really occurred.

[4]Neither plaintiff in the Arizona cases ever purchased gasoline from either petitioner. *See* Appellants' Opening Brief before the Ninth Circuit at pages 8 and 9. While Petrol Stops' primary supplier of gasoline, Armour Oil Company ("Armour"), was in turn supplied by Douglas and Gulf Oil Company (PSN Br. 28.), Armour was not named in either the Indictment or the Bill of Particulars.

direct dealings or relationship with the entities indicted by the grand jury or to the witnesses who testified before the grand jury.

Lawyers have an obligation to fully inform their clients of the consequences of any and all acts or statements made by the client. Thus, grand jury witnesses will be fully informed of the possible and extensive use of their testimony prior to testifying. Also, lawyers can be expected, in their clients' interest, to more aggressively counsel the grand jury witnesses that, while they are obligated to tell the truth before the grand jury, they should decline from offering any opinions, rumors or suspicions and that the only facts which should be supplied by the witness are those directly elicited by specific questions. To assume, as the government does (U.S. Br. 17.), that a prospective grand jury witness, who knows of the extensive possible use and publication of his entire testimony, will testify as fully and completely as he would otherwise is to ignore human nature. The ability of a grand jury to ferret out antitrust violations should not be so compromised, particularly where a more restrictive and selective disclosure can fully satisfy any demonstrated particularized needs of civil litigants.

The possible harm which could arise from the disclosure of the entire text of a witness' transcript to a private civil litigant is not confined to that witness or to the grand jury system. Within that witness' transcript may be disclosed the names of innocent individuals and all the acts they may have been suspected of doing by that witness, by the prosecutor or by a grand juror, as revealed in the questions to that witness. The need to protect the innocent accused from disclosure of the fact that he was under investigation

is a concern that neither Petrol Stops nor the government seriously addresses. Petrol Stops chooses instead to assert erroneously that Douglas and Phillips for the first time argue this issue before this Court.[5] (PSN Br. 10, 11 and 27.) An entire *section* of Douglas and Phillips' brief before the Ninth Circuit was devoted to this issue.[6] Petrol Stops then proffers an argument for which there is neither factual, precedential nor logical support. Petrol Stops suggests that Rule 16 of the FRCrP *insures* that no interest to an innocent party is endangered because that Rule provides that only those portions of employee witness transcripts which are "relevant" to the offense charged are released. (PSN Br. 11, 14, 17 and 28.) Petrol Stops cannot believe, as it entreats this Court to do, that every reference to every investigated individual or corporation who was not indicted that appears in a witness' transcript was excised from that transcript prior to its release to that witness. In fact, the prevailing practice among all courts is to release to any indicted defendant the entire text of his testimony before the grand jury for use during

[5]"The defendants in their brief for the first time argue the disclosure ordered endangered another interest sheltered by grand jury secrecy—the need to protect an innocent accused from exposure of a prior criminal investigation. This argument was not made to the lower courts." (PSN Br. 10.)

[6]*See* Section I.B.2 of the Reply Brief of Appellants before the United States Court of Appeals for the Ninth Circuit, at pages 15 and 16, which is entitled:

Grand Jury Secrecy Is Also Necessary in This Case, Absent a Showing of Particularized Need, to Protect the Innocent Accused Who is Exonerated from Disclosure of the Fact That He Has Been Under Investigation and from the Expense of Standing Trial Where There Was Probably No Guilt.

his criminal defense. *United States v. Longarzo,* 43 F.R.D. 395, 396 (S.D.N.Y. 1967); *United States v. Gleason,* 259 F.Supp. 282, 285 (S.D.N.Y. 1966); and *United States v. United Concrete Pipe Corporation,* 41 F.R.D. 538, 539 (N.D. Tex. 1966). This prevailing practice was followed by the California court in this case.

II

The Possibility of Harm to Grand Jury Witnesses, Innocent Parties and the Grand Jury System Occasioned by the Overly Broad Disclosure Ordered by the Courts Below Cannot and Will Not Be Prevented by a Protective Order

Douglas and Phillips submit that Petrol Stops never demonstrated a particularized need for disclosure of any portion of the transcripts of Douglas and Phillips witnesses, much less for the entire texts of those transcripts. (Pet. Op. Br. 21-26.) Douglas and Phillips in answers to a single interrogatory question stated that they were unaware of any conversation or communication with major oil company competitors regarding the wholesale price of gasoline sold to unbranded marketers. These were claimed by respondents to be contradicted by the *nolo contendere* pleas by Douglas and Phillips to an indictment in which they were co-defendants with entirely different non-major oil companies. Such was Petrol Stops' "need" to impeach these answers.

It is difficult to conceive any need to impeach an interrogatory answer.[7] Even so, no admission of guilt

[7]The interrogatory answers are not in evidence in the civil cases and can be made so only if placed there by respondents.

(This footnote is continued on next page)

from a *nolo contendere* plea extends beyond that needed for disposition of the proceedings in which it is entered. *North Carolina v. Alford,* 400 U.S. 25, 35 n.8 (1970).[8] But if the contrary were true, it is sheer speculation that the transcripts would contain any information contradicting the interrogatory answer. No justification was

---

Presumably respondents would not deliberately place themselves in the position of having to impeach evidence offered by themselves. Even should they contemplate this, how can the answer be impeached except by proof of Petrol Stops' claim of conspiracy? Thus, Petrol Stops' need is not a *particularized* need but the common need of all plaintiffs—the need to prove their causes of action.

[8]In criminal antitrust actions brought by the government, a defendant's plea of *nolo contendere* is recognized as an aid to antitrust enforcement by encouraging defendants to capitulate with the result of saving time and expense to the Antitrust Division of the government. *See Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.,* 323 F.2d 412, 415 (7th Cir. 1963); *cert. denied,* 376 U.S. 939 (1964). A defendant's reasons for pleading *nolo* may be based upon considerations wholly separate from any alleged guilt on its part, *e.g. United States v. Prince,* 533 F.2d 205, 207 (5th Cir. 1976). Further, the trial court may, on the government's objection, refuse to accept the plea where the government's proof is more than adequate and the offense is of a more serious nature, thereby serving the objective of aiding private treble damage actions by private litigants where appropriate. *Commonwealth Edison Co., supra,* 323 F.2d at 416-417.

The incentive for a defendant's *nolo* plea is the rule that his plea is only an admission for purposes of the criminal antitrust case wherein it is entered and no other. *See Alford, supra,* 400 U.S. at 35; Section 5(a) of the Clayton Antitrust Act, 15 U.S.C. §16(a). Respondents herein have failed to consider the concomitant detrimental effects of their contention that a *nolo contendere* plea in an antitrust case may subsequently be used by an unrelated civil litigant as *prima facie* evidence of impeachment value in obtaining the defendant's grand jury transcripts. (PSN Br. 33-34; U.S. Br. 13.) Their position, if adopted by this Court, would have an extreme chilling effect on the use of *nolo* pleas as it would signal to antitrust defendants that their pleas may be used for impeachment in subsequent civil actions and as an easy means of gaining access to otherwise secret grand jury materials. Such a result is clearly contrary to and would undermine the congressional purpose behind Section 5(a) of the Clayton Act. *Cf.,* Note, Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions, 85 Yale L. J. 541, 562-563 (1976).

shown for the disclosure of any part of any transcript much less the whole of all Douglas and Phillips' transcripts.

The California court's utter failure to require a showing of particularized need is aptly illustrated by its order which permits the use of transcripts for purposes different than the need that Petrol Stops offered to justify disclosure. Assuming Petrol Stops' need to impeach the interrogatory answers and that the transcripts were actually sought for that purpose, the order entered permitted use of the transcript of each person for wholly different purposes: "to be used . . . solely for the purpose of impeaching that witness or refreshing the recollection of a witness, either in deposition or at trial." (A. 48-49.) No showing had been made that any witness needed his recollection refreshed. There was *no* testimony to be impeached because no witness had testified. There was no certainty that any particular witness would be called. Thus, there was no justification for the disclosure of the entire transcript or any part thereof.

The disclosure of all the testimony contained within a witness' transcript involving unrelated business practices and the suspected conduct of parties who were never indicted cannot satisfy any legitimate need much less the "particularized need" offered by Petrol Stops. Instead that overly-broad disclosure succeeds in endangering the legitimate needs of grand jury witnesses, third parties mentioned by grand jury witnesses, and the grand jury system which the "particularized need" requirement was itself conceived to protect. Once disclosed, no protective order can adequately protect the individuals who are endangered by an unnecessary broad disclosure ordered by a court.

The risk of retaliation against a grand jury witness from firms and individuals other than a witness' corporate employer remains despite any protective order. A civil plaintiff pursuing treble damages in an antitrust case has every incentive to interview any and all individuals who are mentioned in a grand jury transcript. In so doing, the third parties interviewed and possibly deposed by counsel will undoubtedly learn all that the grand jury witness said about them. This unfortunate result may occur even though the substance of the grand jury witness' testimony may have had nothing at all to do with the subject matter of that lawsuit! Petrol Stops has itself revealed that it does not intend to be bound by the issues of its lawsuit when it embarks upon general discovery under the broad aegis of this "protective order".

> Access to grand jury materials for the sole purpose of attacking or testing credibility raises no issues which compel reference of the plaintiffs' petition to the district court in which the antitrust actions are pending. (PSN Br. 18.)

The language of the present protective order, coupled with the fact that no depositions had been taken prior to disclosure of the transcripts, does not practically limit Petrol Stops' use of the transcripts. The order permitted use of a witness' transcript "for the purpose of impeaching that witness or refreshing the recollection of a witness." (A. 49.) Since it is not possible to impeach statements not yet said, a transcript could be used as a detailed deposition outline, eliciting all statements which could then be impeached by reference to the transcribed testimony. Such a use would arguably still be for "impeachment purposes", but it is hardly the narrow use which Petrol Stops and the government

suggest the protective order insures. The identical anticipated use was held by this Court not to constitute a "particularized need" in *United States v. Procter & Gamble Company*, 356 U.S. 677, 682-683 (1958).

Notwithstanding Petrol Stops' protestations regarding the rigors of the protective order and the Code of Professional Responsibility (PSN Br. 27.), it is too much to expect that a fact, once learned by an advocate, will be forgotten for all purposes except those for which he is "allowed" to use it. If any information becomes available that a party exonerated by the grand jury *may* have been guilty of wrongdoing for which a private civil litigant arguably has a right of recovery, it is reasonable to expect that the "innocent party" will be investigated by the private civil litigant and may be made a party to the civil litigation even though no information other than that presented to the grand jury is developed by that private litigant. To expect otherwise of this or any other civil antitrust litigant is simply not realistic. But to make this "innocent accused" face suit in a civil proceeding only because a grand jury witness related some uncorroborated suspicion or tip is patently unfair. If the interests and needs of innocent parties, grand jury witnesses and the grand jury system are to be adequately protected, selective disclosure and not broad disclosure with the promise of selective use is required.

III

Selective Disclosure Satisfies the Needs of Civil Litigants and Adequately Protects the Continuing Need for Grand Jury Secrecy

Petrol Stops argues that the disclosure of entire witness transcripts coupled with a protective order is the only practical alternative. (PSN Br. 32.) It is

not. An approach which unnecessarily discloses grand jury testimony and exposes individuals and the grand jury system to injury is hardly a practical or desirable solution to the problem. Adequate protection of these interests within the context of antitrust litigation requires that only those *portions* of a witness' transcript that satisfy a civil litigant's actual and compelling need should be disclosed. References to innocent individuals, information readily accessible through civil discovery means, matters unrelated to plaintiff's lawsuit and/or the indictment should not be disclosed beyond the criminal proceeding. The only practical means of assuring such a result is an *in camera* inspection.

Petrol Stops assumes that this Court will be unwilling to protect the continued needs for grand jury secrecy as they exist in this and other antitrust cases if disclosure less broad than the production of an entire witness transcript is required to do so. Petrol Stops cites *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395 (1959), as evidencing this Court's reluctance to require a showing of contradiction before access is granted (PSN Br. 33.), and cites *Dennis v. United States,* 384 U.S. 855 (1966), as precluding an *in camera* inspection as a satisfactory alternative. (PSN Br. 53.)

The *Dennis* case cannot fairly be read to mean, as Petrol Stops suggests, that an *in camera* inspection is never appropriate when grand jury materials are sought. In that very case, this Court made reference to the "long-established policy" of grand jury secrecy and lifting its veil "discreetly and limitedly" in those instances where appropriate, *Dennis, supra,* 384 U.S. at 869-870. A reference to the unanimous view of this Court in

Pittsburgh Plate Glass indicated that, upon a showing of particularized need, defense counsel "might have access to *relevant portions* of the grand jury testimony of a trial witness." *Dennis, supra,* 384 U.S. at 870 [emphasis added]. Moreover, the rejection of *in camera* inspection by this Court in *Dennis* was founded on the concern that a federal judge should not, in the middle of a criminal trial determine what portion of an actual, accusatory witness' transcript may be of utility in a cross-examination by the counsel charged with the defense of the accused.[9] It is quite a different matter, in the course of a civil proceeding (*not* in the middle of a trial) for the trial judge (or magistrate) to determine whether a portion of a transcript falls within an articulated "particularized need". This Court has never affirmed, ordered, condoned or otherwise intimated that *entire* grand jury witness transcripts are to be disclosed to *any* parties, let alone civil plaintiffs. Yet Petrol Stops offers precisely that result as "the only practical alternative" when grand jury testimony is sought.

An *in camera* inspection of antitrust grand jury testimony is required if both the special needs for continued grand jury secrecy that accompany an antitrust grand jury and the legitimate needs of litigants are to be satisfied. If the judge does not have time, this task can easily be accomplished with the use of

---

[9]Although *Dennis* shows concern for substituting the trial court's judgment for that of defense counsel in determining what specific language in the grand jury transcript would be helpful in cross examining the witness, a careful reading of the opinion shows this Court's continuing concern that the court examine the transcript sufficiently to delete those portions not relevant to the subject matter of the witness' testimony in the criminal trial.

magistrates.[10] The use of magistrates to inspect, *in camera*, grand jury testimony will permit the proper disclosure of grand jury materials without excessive demands upon district court judges.

IV

The California Court Should Have Either Declined to Rule on Petrol Stops' Petition and Instructed Petrol Stops to Seek a Ruling From the Trial Court or Deferred the Question of Need to the Trial Court

The trial court whose task it is to supervise these complex antitrust actions was the court best equipped to determine whether plaintiffs had a particularized need for the grand jury testimony sought. In this case, a judge wholly unfamiliar with the grand jury proceeding or with the complex civil antitrust cases, their discovery status and pretrial schedules should at the very least have deferred the issue of need to the Arizona court. A better approach would have been for the California court to decline entirely to rule on the petition before it and instruct Petrol Stops to seek a ruling from the Arizona court on the issue. Either available course would have been preferable to the procedure followed by the California court.

That the Arizona court was the most informed tribunal to decide the issue of need is hardly debatable. Petrol Stops insists it is no problem for a court to determine relevancy of grand jury material to a suit pending in another court because all that is required is a mere

[10]Since *Dennis*, 384 U.S. 855 (1966), the Federal Magistrate Act, 28 U.S.C. § 631 *et seq.*, has been enacted in 1968. That Act was passed to permit district courts to increase their overall efficiency, *Mathews v. Weber*, 423 U.S. 261, 266-270 (1976), and to allow magistrates to more actively assist judges in their judicial decision-making functions. ***O'Shea v. United States***, 491 F.2d 774, 777 (1st Cir. 1974).

look at the claims and defenses in the action. Such a view ignores the dispositive effects of pretrial and interim orders of the trial judge that are common but important in complex antitrust actions. Why, for example, should grand jury materials be turned over if a plaintiff's claim may be vulnerable to attack on the basis of standing or lack of injury under the doctrine articulated by this Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)?

Petrol Stops does not choose to address substantively the contention that the determination of relevancy in complex antitrust actions is a formidable task often requiring information beyond the four corners of the complaint. (Pet. Op. Br. 28-31.) Instead, we are told, it is not a formidable task and one to which district courts are accustomed. (PSN Br. 18, 37 and 38.)[11] Only where courts consistently err on the side of liberal discovery is a relevancy determination in a complex antitrust action an easy task. That tendency of courts in the past has led to the popular dissatisfaction with the current scope of discovery and, correspondingly, to the suggested revisions to Rule 26(b)(1) of the FRCP. (Pet. Op. Br. 31.) The trial court was better equipped to rule on relevancy. It was also the better equipped to rule on issues other than rele-

[11]Petrol Stops, attempting to argue by analogy, notes that district courts, other than the district in which an action is pending, frequently determine issues of relevancy for the purpose of ruling on deposition subpoenas under Rule 45(d)(1), Federal Rules of Civil Procedure ("FRCP"). (PSN Br. 18, 37 and 38.) The procedural rule cited by Petrol Stops reflects the need to have *some* court decide a discovery issue where a third party witness is not within the jurisdiction of the informed trial court. It hardly supports the proposition that the two courts are equally well-equipped and informed to rule on the relevancy issue as to the claims of the parties that are subject to the trial court's jurisdiction.

vancy which are required to show particularized need—whether the information is accessible through other discovery means and whether a particularized rather than simply a general need for the testimony exists. The California court ignored the clear advantage of the trial court with respect to these issues.

The California judge's offer to phone the Arizona judges and inquire whether they had any objection to the California court's ruling did not, as Petrol Stops suggests, discharge any obligation of the California court to defer the issue of relevance and need to the more informed trial court. (PSN Br. 38-40.) The judge did not offer to place the particularized need issue before the trial court. He did not offer to present to the trial court the competing arguments of counsel and the benefits of a hearing. The judge instead simply offered to "telephone Judge Walsh and Judge Frey to see if they have any objection" to a brother judge's ruling. (A. 56.) That offer falls far short of providing for the trial court's informed participation in the matter.

Petitioners do not contend either that the grand jury court lacks power to order disclosure or that the government should be excluded from participation in the court's determination. The government will not be excluded. The government is the party from whom the defendant in a criminal proceeding must originally seek the transcript. If the government desires to enforce the general policy of grand jury secrecy or if it has a particularized motivation (such as the protection of an informer), it may request that the order releasing the transcript to the defendant contain appropriate restrictions on its use and that the transcript be returned at the close of the criminal case.

The grand jury court may order the release of the transcript to the defendant without restriction. In such a case, any subsequent court having jurisdiction over the defendant may order him to produce the transcript upon an appropriate showing. The government would not need to be a party to that latter proceeding since it had been a party in the initial proceeding which ordered the release of the transcript without restriction.

In the more common situation, a court order releasing a transcript to a defendant contains restrictions on the use of the transcript and requires its return at the close of the criminal proceeding. Such restrictions may require a party seeking the transcript from the defendant to petition the court which issued the order to lift the restrictions. If the restrictions are to be lifted by the grand jury court, the Government would automatically be a party to that proceeding, and the trial court can then address the issue of particularized need upon receipt of an appropriate application.

V

Phillips and Douglas Had Standing to Challenge an Order Granting Access to Transcripts of Their Witnesses' Grand Jury Testimony

Petrol Stops raises an issue for which no cross-petition for certiorari was filed: whether Douglas and Phillips had standing to challenge an order granting access to grand jury materials under Rule 6(e) of the FRCrP. (PSN Br. 40-42.) Petrol Stops is precluded by the Ninth Circuit's final ruling and their failure to petition for certiorari on this issue from now seeking review of it. Rule 40(1)(d)(2) of the Revised Rules of the United States Supreme Court; *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967);

J. I. Case Co. v. Borak, 377 U.S. 426, 428 (1964). Moreover, the Ninth Circuit correctly held that Douglas and Phillips did have standing to challenge the district court's order. (A. 2-4.) *Cf., Association of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150, 152-154 (1970).

Conclusion

The end of the criminal proceedings does not end the need for grand jury secrecy. If actual harm to individuals and the grand jury system is to be avoided, and litigants afforded access to specific testimony when their legitimate needs require it, the particularized need standard that regulates the disclosure of grand jury materials must be observed and procedures must be employed to insure that that standard is observed. Otherwise, the ability of future grand juries to ferret out antitrust violations will be severely and unnecessarily compromised.

LATHAM & WATKINS,
MAX L. GILLIAM,
MORRIS A. THURSTON,
GEORGE H. WU,

RODERICK G. DORMAN,
THOMAS H. BURTON, JR.,

Attorneys for Petitioner Douglas Oil Company of California.

EVANS, KITCHEL & JENCKES, P.C.,
HAROLD J. BLISS, JR.,

Attorneys for Petitioner Phillips Petroleum Company.